

Geneva, 14 January 2020

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Dear Sir, Dear Madam,

Please find enclosed the submission of the International Committee of the Red Cross (ICRC) to the Alþingi Inquiry into Resolution 70/150, "Bann við kjarnorkuvopnum" ("Prohibition of nuclear weapons").

Yours sincerely,



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Encl.: Factsheet Treaty on the Prohibition of Nuclear Weapons (TPNW)
ICRC responses to key TPNW challenges



ICRC

Treaty on the Prohibition of Nuclear Weapons: Responses to key challenges

This memorandum presents the views of the International Committee of the Red Cross (ICRC) on some key concerns and criticisms that have been raised about the Treaty on the Prohibition of Nuclear Weapons (TPNW). The ICRC will also provide briefing papers on more technical and legal matters on www.icrc.org and through its partners in the Red Cross and Red Crescent Movement.

Since 1945, the International Red Cross and Red Crescent Movement, of which the ICRC is a part, has been calling for the prohibition and elimination of nuclear weapons. Our call was first driven by the unspeakable suffering caused by the atomic bombs in Hiroshima and Nagasaki, which the ICRC and the Japanese Red Cross witnessed first-hand while attempting to bring relief to the dying and injured. The nuclear blasts had wiped out these cities, instantly killing tens of thousands of people, obliterating medical facilities, and leaving behind appalling conditions for survivors. Tens of thousands more died in the following years due to radiation poisoning. And seven decades on, we still bear witness to the long-term effects of nuclear weapons, as Japanese Red Cross hospitals continue to treat many thousands of victims of cancers caused by radiation exposure.

The International Red Cross and Red Crescent Movement's call to prohibit and eliminate nuclear weapons has also been guided by the fact that we would be unable to provide any meaningful humanitarian response in the event of the use of nuclear weapons. The reality is that if a nuclear weapon were to detonate in or near a populated area, there would be an overwhelming number of people in need of treatment, while most of the local medical facilities would be destroyed. Assistance providers would also face serious risks associated with exposure to ionizing radiation. The ICRC's own studies, and those of UN agencies, have found that in most countries and at the international level, there is little capacity and no realistic or coordinated plan to deal with these tremendous challenges.

Our Movement has also expressed deep concern at the increasing risks of use of nuclear weapons by intent, miscalculation or accident¹. Nuclear weapon States are modernizing their arsenals, developing new kinds of nuclear weapons, and making them easier to use. Military incidents involving nuclear-armed States are occurring with disturbing frequency. At the same time, we see previous restraints steadily falling away, and a deeply concerning erosion of the international framework governing nuclear disarmament and arms control.

The horrific immediate and long-term consequences of nuclear weapons, some of which are described above, can hardly be reconciled with the fundamental rules of international humanitarian law that bind all States. On this basis, in 2011, our Movement appealed to all

¹ See most recently: Nuclear Weapons: Averting a Global Nuclear Catastrophe, Appeal by Peter Maurer, President of the ICRC, 23 April 2018 (<https://www.icrc.org/en/document/nuclear-weapons-averting-global-catastrophe>).

States to ensure that these weapons are never again used and are eliminated through a legally binding international agreement, based on their existing obligations and commitments. Our Movement has therefore welcomed and called on all States to promptly sign, ratify or accede to, and faithfully implement the 2017 *Treaty on the Prohibition of Nuclear Weapons* (TPNW) and other key nuclear disarmament and non-proliferation weapons agreements.²

A large number of States, including the 122 States that adopted the Treaty and some others, are currently considering whether to join the 80 States that have already signed and 34 that have ratified or otherwise acceded to the TPNW.

1. Defense with weapons that are incompatible with international humanitarian law is never an option.

A number of critics of the TPNW cite the existing international security environment or current/potential membership in nuclear weapon-based security arrangements as cause for remaining outside the treaty. This can hardly be reconciled with the recognition by all States Parties to the Treaty on the Non-proliferation of Nuclear Weapons (NPT) in 2010 of the "catastrophic humanitarian consequences of any use of nuclear weapons", with States' commitment in the NPT 2010 Action Plan to reduce the role of nuclear weapons in security policies" and the need to comply with international humanitarian law (IHL). Citing security conditions or "security concerns" as justification for use or threat of use of a weapon the use of which is generally seen as illegal undermines the requirement that States respect IHL in all situations of conflict. It also provides an incentive for other States, many facing immediate security threats, to seek nuclear weapons and/or participation in nuclear alliances for "self-defence" purposes. The argument would thereby justify nuclear proliferation.

2. The best way to safeguard the NPT is to implement it.

Many critics have expressed concern about the impact of the TPNW on the NPT. Yet the TPNW explicitly affirms that the NPT is "the cornerstone of the nuclear disarmament and non-proliferation regime" and that its "full and effective implementation" has "a vital role to play in promoting international peace and security".

The TPNW complements and supports the NPT's nuclear disarmament and non-proliferation objectives. Indeed, the TPNW's clear and comprehensive prohibition of nuclear weapons creates a further disincentive for the proliferation of nuclear weapons, and represents a concrete step towards implementing the NPT's Article VI obligation to pursue negotiations on effective measures for nuclear disarmament. Concerns about safeguarding the NPT as the cornerstone of nuclear disarmament efforts should focus on ensuring the full and effective implementation of its article VI obligations and, in particular, the far-reaching disarmament commitments undertaken in the Action Plan of the 2010 NPT Review Conference.

² Council of Delegates resolution CD/17/R4 "Working towards the elimination of nuclear weapons", adopted by consensus.

The absence of an obligation on States Parties to the TPNW to accept safeguards³ of the IAEA's Additional Protocol is often cited as a weakness of the Treaty. Yet this perceived weakness also exists under the NPT.

It is also important to note that the TPNW foresees the future adoption by States Parties of verification agreements with States that possess nuclear weapons as well as other “measures for the verified, time-bound and irreversible elimination of nuclear-weapon programmes, including additional protocols to this Treaty”. In this regard, its provisions are stronger than those of the 1972 Biological and Toxin Weapons Convention that still has neither verification provisions nor commitments to develop them. Yet it has attracted 183 State Parties.

3. National vs human security: a false dilemma.

All States face their own security concerns. Those that negotiated, adopted, signed and ratified the TPNW face the same unstable international security environment as others. Some are also in security partnerships or alliances with nuclear weapon States or face immediate security threats. Yet most countries see the continuing existence of nuclear weapons as a major source of *insecurity* for their populations and for future generations, and view the past failure to fulfil nuclear disarmament obligations as a driver of current nuclear proliferation challenges, interstate confrontations and the increasing risk of catastrophic conflict.

4. Concerns about impact of the TPNW, but where is an alternative strategy?

Critics of the TPNW offer valid but unanswerable questions about the impact of the TPNW, over time, in promoting nuclear disarmament. Some suggest that adherence to the TPNW is divisive and undermines the unity of purpose needed to achieve the objective of nuclear disarmament. This misrepresents the essential character of the Treaty – namely its moral and legal stance *against* nuclear weapons and *against* a potential global nuclear conflagration that could impact all human beings and societies. It establishes a new global norm of international humanitarian and disarmament law that nuclear weapons are not only morally unacceptable but also illegal. Regardless of the time frame one believes is needed to achieve nuclear disarmament, an unambiguous norm establishing the illegality of nuclear weapons will be needed. The TPNW provides this clarity and a vision for all States of the end-state towards which they must move.

The disappointing historical record of implementation of nuclear disarmament obligations and commitments, recent threats of nuclear weapons use and ongoing modernization of arsenals suggest that nuclear weapon States have been unable to make lasting progress on long-standing nuclear disarmament undertakings. There is no reason to believe this will change without countervailing normative pressure from the international community. Many important States also took years, even decades, to adhere to the 1925 Geneva Protocol banning the use

³ “Safeguards” are a set of technical measures (e.g. on-site inspections, visits, and ongoing monitoring and evaluation) applied by the International Atomic Energy Agency (IAEA) pursuant to bilateral agreements concluded with States, that aim to ensure that the State is using nuclear material and technology solely for peaceful purposes, and to confirm that these are not being misused or diverted for nuclear weapons activities. There are two principal types of safeguards agreements administered by the IAEA: (1) the Comprehensive Safeguards Agreement (CSA), which is the minimum standard that all non-nuclear weapon NPT States Parties are required to adhere to pursuant to Article III of the NPT, and (2) the Additional Protocol (AP), which these States may voluntarily enter into and which contains safeguards that are more intrusive than those of the CSA.

of chemical and biological weapons. Yet the Protocol helped prevent the use of such weapons in most subsequent conflicts, even though not all major military powers had adhered to it.

In light of the above, it is unfortunate that the TPNW is often criticized without providing an alternative strategy for addressing the current trend of steadily increasing risks of nuclear weapon use, for reversing modernization programs that are making nuclear weapons more useable or for time-bound implementation of the many crucial commitments made by State Parties to the NPT in its 2010 Action Plan and on many previous occasions. Criticism without alternatives simply reinforces an increasingly dangerous status quo.

In reality, the TPNW's overall success and impact depend on the broadest possible adherence by a wide variety of States including neutral States, developing countries, regional leaders, those associated with nuclear weapon-based military arrangements and, eventually, by all States.

The concrete evidence now available of the massive, indiscriminate and irreparable health, environmental and societal impacts of nuclear weapons and of their inconsistency with international humanitarian law should not be weighed against unpredictable security scenarios or questions about impacts of the TPNW that will only be answered by historians. Judgments about the TPNW should be based on the responsibility of all States to protect humanity from the scourge of a nuclear catastrophe that would add extraordinary levels of human suffering to current unmet needs, and on States' long standing obligations under international humanitarian and disarmament law.

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"We know now more than ever before that the risks are too high, the dangers too real. It is time for States, and all those in a position to influence them, to act with urgency and determination to bring the era of nuclear weapons to an end."

*Peter Maurer, President of the ICRC
Statement to the Geneva diplomatic corps, 18 February 2015*



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2017 Treaty on the Prohibition of Nuclear Weapons

The Treaty on the Prohibition of Nuclear Weapons (TPNW) is the first globally applicable multilateral agreement to comprehensively prohibit nuclear weapons. It is also the first to include provisions to help address the humanitarian consequences of nuclear weapon use and testing. The Treaty complements existing international agreements on nuclear weapons, in particular the Treaty on the Non-Proliferation of Nuclear Weapons, the Comprehensive Nuclear-Test-Ban Treaty and agreements establishing nuclear-weapon-free zones.

The TPNW was adopted by a United Nations diplomatic conference on 7 July 2017 and opened for signature on 20 September 2017. It will enter into force once 50 States have notified the UN Secretary-General that they agree to be bound by it.

What is the purpose and scope of the TPNW?

The TPNW was developed in response to long-standing concerns about the catastrophic humanitarian consequences that any use of nuclear weapons would entail.

The Treaty recognizes that the use of nuclear weapons would be abhorrent to the principles of humanity and the dictates of public conscience, and it comprehensively prohibits nuclear weapons on the basis of international humanitarian law (IHL) – the body of law that governs the use of all weapons in armed conflict. It contains strong commitments to assistance of the victims of nuclear weapon use and testing, and to the remediation of contaminated environments. The Treaty also provides pathways for adherence by all States, including those that

possess, or are associated with, nuclear weapons.

Aren't nuclear weapons already prohibited under international law?

In a 1996 Advisory Opinion,¹ the International Court of Justice concluded that the threat or use of nuclear weapons would generally be contrary to the requirements of the international law applicable in armed conflict, particularly the principles and rules of IHL. However, it left open the question of the lawfulness of threatening to use or using nuclear weapons in an extreme situation of self-defence in which the very survival of a State is at stake. Thus, the Court did not construe IHL to categorically prohibit the use of nuclear weapons.

In addition to the principles and rules of IHL, there are a number of multilateral agreements that

regulate nuclear weapons. However, none of these establishes a comprehensive set of prohibitions applicable at the global level. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is a cornerstone of international law governing nuclear weapons. It prohibits State Parties that do not already have nuclear weapons from developing or acquiring them. State Parties that possessed nuclear weapons at the time of the NPT's adoption are allowed to retain their weapons but are barred from transferring them or helping others to develop or acquire them. All NPT States Parties are required to pursue negotiations on effective measures to advance nuclear disarmament.

A number of treaties also establish parts of the world as nuclear-weapon-free zones. These treaties generally contain

¹ International Court of Justice, "Legality of the threat or use of nuclear weapons", Advisory Opinion, *I.C.J. Reports* 1996, 1996, pp. 226–267.

prohibitions on a wide range of nuclear-weapon-related activities that are applicable in that region. Such treaties are in force in Africa, Latin America and the Caribbean, and Central and South-East Asia.

Until now, nuclear weapons had not been the subject of a globally applicable prohibition treaty that all States could join. The adoption of the TPNW has filled this gap.

What are the main obligations of the TPNW?

Prohibition

It is prohibited under any circumstances to use or threaten to use nuclear weapons (or other nuclear explosive devices). It is equally prohibited to develop, test, produce, manufacture, otherwise acquire, possess or stockpile them (Art. 1.1(a) and (d)).

It is also prohibited for a State Party to transfer nuclear weapons, to receive the transfer of or control over nuclear weapons or to allow the stationing, installation or deployment of nuclear weapons in its territory or at any place under its jurisdiction or control (Art. 1.1(b), (c) and (g)).

Furthermore, it is prohibited to in any way assist, encourage or induce anyone to engage in any activity prohibited by the Treaty (Art. 1.1(e)).

Elimination of nuclear weapons

Within 30 days of becoming a party to the Treaty, a State must submit a declaration to the UN Secretary-General indicating if:

- it has previously possessed nuclear weapons,
- it currently possesses such weapons, or
- there are nuclear weapons of another State in any place under its jurisdiction or control (Art. 2).

The answers to these questions determine the next steps a State Party must take to ensure the elimination of nuclear weapons:

- A State Party that **did not possess nuclear weapons** on the date that the Treaty was adopted (7 July 2017) and has an existing safeguards agreement with the International Atomic Energy Agency (IAEA) must maintain that agreement (Art. 3.1).

If the State does not have safeguards obligations in force, it must conclude a comprehensive safeguards agreement with the IAEA. This agreement must enter into force within 18 months from the date on which the State became a State Party (Art. 3.2).

- A State Party that **possessed nuclear weapons after 7 July 2017 and destroyed them prior to joining the Treaty** must cooperate with an international authority mandated to verify the irreversible elimination of the State's nuclear weapon programme. This authority will be designated by a meeting of States Parties. The State Party must also conclude a safeguards agreement with the IAEA (Art. 4.1).
- A State that **possesses or controls nuclear weapons at the time that it becomes a State Party** must immediately remove its weapons from operational status. It must also destroy them as soon as possible but not later than a deadline to be established by the first meeting of States Parties, in accordance with a legally binding, time-bound plan for the verified and irreversible elimination of the State Party's nuclear weapon programme (Art. 4.2). The State Party must also conclude a safeguards agreement with the IAEA (Art. 4.3).

- A State Party that **has the nuclear weapons of another State on its territory** (via stationing, installation or deployment) must ensure that such weapons are removed as soon as possible but not later than a deadline to be determined by the first meeting of States Parties (Art. 4.4).

Victim assistance and environmental remediation

The Treaty recognizes the suffering and harm caused to the victims of nuclear weapon use and testing as well as the impact on indigenous peoples and the environment.

A State Party with individuals under its jurisdiction who are victims of nuclear weapon use or testing must provide them with medical care, rehabilitation and psychological support, and provide for their socio-economic inclusion (Art. 6.1).

Similarly, a State Party whose territory has been contaminated through nuclear weapon use or testing must take measures towards the environmental remediation of affected areas (Art. 6.2).

International assistance and cooperation

States Parties must cooperate to facilitate the successful implementation of the Treaty. Each State Party also has the right to seek and receive assistance to fulfil the Treaty's requirements (Art. 7.1 and 7.2).

This cooperation is fortified by a requirement to assist States Parties affected by nuclear weapons. Each State Party in a position to do so must provide technical, material and financial assistance to States Parties that have been affected by nuclear weapon use or testing, to help them implement the Treaty. They must also assist the victims of nuclear weapon use or testing (Art. 7.3 and 7.4).

Assistance can be provided through the United Nations,

international or regional organizations, non-governmental organizations, the International Red Cross and Red Crescent Movement or on a bilateral basis (Art. 7.5).

What must a State do to join the Treaty?

The Treaty remains open for signature indefinitely and can be signed at UN headquarters in New York.

The Treaty will enter into force 90 days after the deposit of the 50th instrument of ratification, acceptance, approval or accession with the UN Secretary-General, the Treaty's depositary.

A State that wishes to be bound by the Treaty must submit an instrument of ratification, acceptance, approval or accession to the UN Secretary-General. It will become binding upon that State 90 days later or, for the first 50 States that ratify, upon the entry into force of the Treaty.

What must States do to implement the Treaty and how is compliance ensured?

Adoption of domestic measures

Each State Party is required to take all necessary measures to implement the Treaty's provisions (Art. 5). This includes the adoption of legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any violations committed by persons, or on territory, under its jurisdiction or control (Art. 5.2). To this end, depending on the State's domestic law and procedure, specific domestic legislation may need to be adopted and the regulations governing the armed forces amended.

In addition, States must take measures towards the elimination of nuclear weapons, the provision of victim assistance, environmental remediation, and international

assistance and cooperation in accordance with the respective obligations under the Treaty (Art. 5).

Meetings of States Parties

The implementation of the Treaty is monitored through meetings of States Parties. A first meeting of States Parties will be convened within one year of the Treaty's entry into force. These meetings will assess the Treaty's status and implementation and take decisions to advance the elimination of nuclear weapons (Art. 4). Additional meetings will be held on a biennial basis, unless States Parties decide otherwise (Art. 8.1 and 8.2).

What support is available for joining and implementing the TPNW?

The status of signatures and ratifications of the TPNW is available online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=en.

The ICRC has prepared publications to assist States in understanding the Treaty's requirements. This includes a ratification kit describing the procedures that a State must follow in order to sign, ratify, accept, approve or accede to the TPNW. The kit also contains model instruments of signature and adherence for States to deposit with the UN Secretary-General. These materials can be found on the ICRC website (www.icrc.org).

The ICRC is ready to assist States in implementing the TPNW, within the scope of its mandate and expertise in IHL.

The ICRC's delegations throughout the world and its Department of International Law and Policy in Geneva can provide guidance on implementing the Treaty's requirements in domestic legislation and any further information or clarification that may be required.

Assistance to implement various aspects of the Treaty may also be provided through National Red Cross and Red Crescent Societies and the International Federation of National Red Cross and Red Crescent Societies.

A number of other organizations, such as the United Nations Office for Disarmament Affairs, have also prepared important tools to help States understand and implement the TPNW.

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